

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

ANNIE KRISTINE H.,

Plaintiff,

1

COMMISSIONER OF SOCIAL
SECURITY,

Defendant.

CASE NO. 3:22-CV-5696-DWC

ORDER AFFIRMING DEFENDANT'S
DENIAL OF BENEFITS

Plaintiff filed this action, pursuant to 42 U.S.C. § 405(g), for judicial review of the denial of her applications for disability insurance benefits (DIB) and social security insurance (SSI) benefits. Pursuant to 28 U.S.C. § 636(c), Fed. R. Civ. P. 73 and Local Rule MJR 13, the parties have consented to proceed before the undersigned. After considering the record, the Court finds no reversable error and affirms the Commissioner's decision to deny benefits.

I. BACKGROUND

Plaintiff filed for DIB and SSI in March 2017 alleging disability beginning September 13, 2016. Administrative Record (AR) 749. Her applications were denied initially and on reconsideration, and again following a hearing before an Administrative Law Judge (ALJ) where

1 Plaintiff was represented by an attorney and testified. AR 26, 32, 77-88, 101-102. The Appeals
 2 Council denied Plaintiff's request for review, making the ALJ's decision final. AR 1-6.

3 Plaintiff appealed the ALJ's decision to the United States District Court for the Western
 4 District of Washington (this Court), and on March 29, 2021 the Honorable Brian A. Tsuchida
 5 entered an order reversing and remanding Plaintiff's case for further proceedings. AR 838-840,
 6 842-851.

7 A new hearing was held before a different ALJ on November 16, 2021 during which
 8 Plaintiff was again represented by an attorney and testified. AR 772-811. Once again the ALJ
 9 found Plaintiff was not disabled, and the Appeals Council denied her request for review making
 10 the ALJ's decision final. AR 739-739, 746-771. On September 22, 2022 Plaintiff again appealed
 11 to this Court. 20 C.F.R. §§ 404.981, 416.1481.

12 **II. STANDARD**

13 Pursuant to 42 U.S.C. § 405(g) this Court may set aside the Commissioner's denial of
 14 social security benefits if the ALJ's findings are based on legal error or not supported by
 15 substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d 1211, 1214 n.1 (9th
 16 Cir. 2005) (citing *Tidwell v. Apfel*, 161 F.3d 599, 601 (9th Cir. 1999)). However, the
 17 Commissioner's decision must be affirmed if it is supported by substantial evidence and free of
 18 harmful legal error. 42 U.S.C. § 405(g); *Tommasetti v. Astrue*, 533 F.3d 1035, 1038 (9th Cir.
 19 2008).

20 Substantial evidence "is a highly deferential standard of review." *Valentine v. Comm'r of*
 21 *Soc. Sec. Admin.*, 574 F.3d 685, 690 (9th Cir. 2009). The Supreme Court describes it as "more
 22 than a mere scintilla." *Biestek v. Berryhill*, 139 S. Ct. 1148, 1153 (2019). "It means—and means

1 only—such relevant evidence as a reasonable mind might accept as adequate to support a
 2 conclusion.” *Id.* (internal quotations omitted).

3 III. THE ALJ’S FINDINGS

4 The ALJ found Plaintiff has the severe impairments of: degenerative disc disease of the
 5 cervical spine and lumbar spine and degenerative joint disease w/S/P surgery. AR 752.

6 The ALJ found that Plaintiff had the residual functional capacity (RFC) to perform light
 7 work limited by: only occasionally climbing ladders, ropes or scaffolds; only occasionally
 8 crawling; only occasional exposure to vibration and extreme cold temperatures; only occasional
 9 bilateral overhead reaching; and, frequent (but not constant) handling and fingering with her non-
 10 dominate (right) upper extremity. *Id.*

11 At step four of the sequential evaluation the ALJ determined that Plaintiff remained
 12 capable of performing her past relevant work as a Sales Attendant and was therefore not disabled
 13 during the relevant period. AR 762. Accordingly, the ALJ did not reach step five of the
 14 sequential evaluation. AR 763.

15 IV. DISCUSSION

16 Plaintiff argues the ALJ erred by overlooking the finding of state agency consultant
 17 Norman Staley, M.D., who opined that Plaintiff should “never crawl and climb ladders, ropes, or
 18 scaffolds”, and erroneously including the occasional performance of these functions in her RFC.
 19 Dkt. 13 at 5-6 (citing AR 762).

20 Plaintiff also contends the ALJ’s partial rejection of her subjective symptom reporting
 21 was legally erroneous, and the ALJ should have credited her testimony including but not limited
 22 to her claim that she would need at least one extra work-break in addition to the standard breaks
 23 in an eight-hour workday, and that she will incur at least one additional absence each month,
 24

1 which the Vocational Expert testified would be work-preclusive. Dkt. 13 at 7 (citing AR 807-
 2 808).

3 Defendant demurs on each argument. *See generally*, Dkt. 15. Plaintiff did not file a reply.

4 **A. Plaintiff's Testimony**

5 **1. Standard**

6 “The ALJ conducts a two-step analysis to assess subjective testimony where, under step
 7 one, the claimant must produce objective medical evidence of an underlying impairment or
 8 impairments that could reasonably be expected to produce some degree of symptom.”

9 *Tommasetti v. Astrue*, 533 F.3d 1035, 1039 (9th Cir. 2008) (citation and internal quotation marks
 10 omitted). “If the claimant meets this threshold and there is no affirmative evidence of
 11 malingering, the ALJ can reject the claimant’s testimony about the severity of [his] symptoms
 12 only by offering specific, clear and convincing reasons for doing so.” *Id.*

13 When assessing a claimant’s credibility the ALJ may consider “ordinary techniques of
 14 credibility evaluation,” such as reputation for lying, prior inconsistent statements concerning
 15 symptoms, and other testimony that “appears less than candid.” *Smolen v. Chater*, 80 F.3d 1273,
 16 1284 (9th Cir. 1996). The ALJ may also consider if a claimant’s complaints are “inconsistent
 17 with clinical observations[.]” *Regennitter v. Commissioner of Social Sec. Admin.*, 166 F.3d 1294,
 18 1297 (9th Cir. 1998).

19 However, affirmative evidence of symptom magnification, or malingering, relieves an
 20 ALJ from the burden of providing specific, clear, and convincing reasons for discounting a
 21 claimant’s testimony. *Greger v. Barnhart*, 464 F.3d 968, 972 (9th Cir. 2006); *Morgan v. Comm'r
 22 of Soc. Sec. Admin.*, 169 F.3d 595, 599 (9th Cir. 1999); *Berry v. Astrue*, 622 F.3d 1228, 1235
 23 (9th Cir. 2010) (upholding finding where ALJ “pointed to affirmative evidence of malingering”).

1 Questions of credibility are solely within the control of the ALJ. *Sample v. Schweiker*, 694 F.2d
 2 639, 642 (9th Cir. 1982). The Court should not “second-guess” this credibility determination.
 3 *Allen v. Heckler*, 749 F.2d 577, 580 (9th Cir. 1984). In addition, the Court may not reverse a
 4 credibility determination where that determination is based on contradictory or ambiguous
 5 evidence. *Id.* at 579.

6 2. Analysis

7 Plaintiff argues the ALJ erred in his assessment of her subjective symptom testimony
 8 when he concluded that her activities of daily living were inconsistent with the degree of
 9 limitation she alleged. Dkt.13 at 7-8 (citing AR 761-762). Plaintiff argues the ALJ failed to show
 10 that these activities undermine her testimony or prove she is able to function in a work
 11 environment. *Id.* at 9.

12 Defendant responds that the inconsistency between Plaintiff’s testimony and her activities
 13 of daily living was but one of several reasons the ALJ gave for discrediting her subjective
 14 symptom reporting. Dkt. 15 at 2, 4.¹ Defendant encourages this Court to dismiss this argument as
 15 unavailing, just as Judge Tsuchida did on Plaintiff’s previous appeal to this Court when Plaintiff
 16 similarly did not challenge the other reasons the ALJ cited for rejecting her testimony. *See* AR
 17 849.

18 The operative ALJ decision in the case at bar is not the same as the decision before Judge
 19 Tsuchida, therefore this Court must review the ALJ’s credibility assessment in the operative
 20 decision to determine whether there is merit to Plaintiff’s claim in this appeal.

21

22
 23 ¹ Indeed, the Court previously found that Plaintiff’s “failure [to challenge all of the ALJ’s findings] is fatal
 24 to her claim because the unchallenged reasons the ALJ articulated are valid grounds to support the ALJ’s
 determination to discount Plaintiff’s testimony.” AR 849.

1 In the operative decision the ALJ summarized Plaintiff's testimony as follows:

2 The claimant alleged that a variety of impairments, including lower back and neck
 3 problems (6E/2) cause **pain** and other symptoms that limit her ability to work.
 4 Reported restrictions include, but are not necessarily limited to, physical activities
 5 that involve lifting, carrying, sitting, standing, and walking. (8E; testimony) The
 6 claimant also variously reported and testified of **prescription medication**
 7 **treatment** for the alleged impairments. (6E/4; 10E/5; 17E; 22E) On appeal, the
 8 claimant reported she underwent **anterior cervical discectomy and fusion** on June
 9 27, 2017. (10E/2-3) She subsequently reported having been diagnosed on October
 10 24, 2017 with a new condition, "**frozen right shoulder.**" (12E/2) However, she
 11 indicated there had not been a change for the worse in her ability to engage in daily
 12 activities. (12E/5) At the hearing held by the undersigned on November 16, 2021,
 13 the claimant testified her **cervical surgery went fabulous**. Now, her neck pain is
 14 very minimal, and she has **just a little bit of nerve pain and right arm limited**
 15 **range of motion**. She testified she **has degenerative disc disease** in her lower back
 16 at L7-S1, for which **surgery was not recommended**, and which puts pressure at
 17 her sciatic nerve causing **leg numbness and instability walking**, and for which
 18 treatment has consisted of **physical therapy and injections**. She testified she
 19 **declined nerve ablation** because it sometimes does not help, and in turn her
 20 doctors told her they would not alternatively prescribe "drugs." She testified she
 21 takes **Gabapentin for nerve pain and a muscle relaxer**. She testified that in the
 22 last 5 years she made **3 trips to California** and also once drove somewhere up by
 23 the **[Canadian] border** but had to turn around because it was closed due to Covid.

24 AR 755 (emphasis added).

14 The ALJ concluded that Plaintiff's testimony was "not entirely consistent with the
 15 medical evidence and other evidence in the record" as outlined in the ALJ's first opinion, which
 16 Judge Tsuchida did not disturb. *Id.* The ALJ summarized that evidence as follows:

17 The overall medical evidence of record establishes that the claimant has functional
 18 limitations due to her severe physical impairments. However, the medical evidence
 19 shows that she is more than capable of sustaining limited **light level work activity**
 20 consistent with the residual functional capacity assessment despite her
 21 impairments. Notably, the medical evidence reveals that her **neck and right upper**
 22 **extremity symptoms somewhat improved with surgery, physical**
 23 **rehabilitation, and injections**. Exs. 9F/23, 24; 14F/87, 96, 97; 16F/21. The
 24 medical evidence also shows that **she received minimal treatment for her low**
back condition. Exs. 15F/5-8; 16F/2-5; 17F/13-20; 19F/1-4. The medical evidence
 further shows that her **diabetes is stable** on her medication regimen. Exs. 14F/28,
 36, 56.

1 AR 759. Finally, the ALJ assessed new evidence post-dating his remanded decision, to further
 2 conclude:

3 While there is sufficient nexus between the objective medical evidence and the
 4 claimant's allegations of pain and limitations, **the objective evidence does not**
support finding the pain was of such a debilitating and intractable nature
as to preclude all substantial gainful activity. The inability to work without
 5 some pain or discomfort is not necessarily disabling under the Act.

6 AR 760 (emphasis added).

7 In sum, the ALJ found the objective medical evidence did not support the degree of
 8 limitation alleged by Plaintiff. AR 754-60. Plaintiff does not dispute this finding, but argues the
 9 ALJ erroneously focused "on the fact that she can perform household chores, engage in activities
 10 of daily living, drive her daughter to school, attend church, and [that] she made three trips to
 11 California during the period at issue." Dkt. 13 at 7-8.

12 The Court finds no merit to this argument, and concurs with Defendant that even if this
 13 argument were persuasive it would not require remand in light of the many other unchallenged
 14 reasons the ALJ gave for discounting Plaintiff's testimony. Dkt. 15 at 7; *see also, Carmickle v.*
 15 *Comm'r, Soc. Sec. Admin.*, 533 F.3d 1155, 1162-63 (9th Cir. 2008)(concluding that errors in two
 16 reasons for rejecting symptom allegations were harmless because the ALJ gave two other valid
 17 reasons).

18 **B. Medical Evidence**

19 Plaintiff argues the ALJ failed to provide specific and legitimate reasons supported by
 20 substantial evidence to discredit some of the functional limitations opined by Norman Staley,
 21 M.D. (Staley). Dkt. 13 at 5. Plaintiff contends that if the ALJ had properly included all of
 22 Staley's limitations in Plaintiff's RFC she should actually be limited to sedentary, not light, work
 23 and that this limitation would render the ALJ's non-disability determination erroneous. *Id.*

1 Defendant responds that any error the ALJ may have committed in this regard is also
 2 harmless because the ALJ determined Plaintiff was not disabled at step four of the sequential
 3 evaluation, finding she could still perform her past work as a Sales Attendant—a job that does
 4 not require crawling or climbing. Dkt. 15 at 2, 7-9.

5 1. Standard

6 This case was filed before March 27, 2017 and is therefore governed by the regulations
 7 for evaluating opinion evidence before this date. AR 749; 20 C.F.R. § 404.1527(b).

8 The ALJ must provide “clear and convincing” reasons for rejecting the uncontradicted
 9 opinion of either a treating or examining physician. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir.
 10 1996) (citing *Embrey v. Bowen*, 849 F.2d 418, 422 (9th Cir. 1988); *Pitzer v. Sullivan*, 908 F.2d
 11 502, 506 (9th Cir. 1990)). When a treating or examining physician’s opinion is contradicted, the
 12 opinion can be rejected “for specific and legitimate reasons that are supported by substantial
 13 evidence in the record.” *Lester*, 81 F.3d at 830-31 (citing *Andrews v. Shalala*, 53 F.3d 1035,
 14 1043 (9th Cir. 1995); *Murray v. Heckler*, 722 F.2d 499, 502 (9th Cir. 1983)). The ALJ can
 15 accomplish this by “setting out a detailed and thorough summary of the facts and conflicting
 16 clinical evidence, stating his interpretation thereof, and making findings.” *Reddick v. Chater*, 157
 17 F.3d 715, 725 (9th Cir. 1998) (citing *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir. 1989)).

18 2. Analysis

19 Plaintiff correctly contends that the ALJ failed to include in her RFC the limitation that
 20 Plaintiff could “never crawl and climb ladders, ropes, or scaffolds”. Dkt. 13 at 5-6 (citing AR
 21 110, 122, 762). In addition, Plaintiff extrapolates that “a person who cannot crawl is a person
 22 who cannot bend or stoop[, and a] person who cannot bend or stoop is a person that must be
 23 limited to sedentary work.” ECF No. 13 at 6.

1 Defendant responds that even if the ALJ erred by failing to incorporate Staley's
 2 limitation into Plaintiff's RFC, this error was harmless and not grounds for reversal because the
 3 ALJ found Plaintiff capable of performing her past relevant work as a Sales Attendant, which the
 4 Dictionary of Occupational Titles (DOT) indicates does not require crawling or climbing. Dkt.
 5 15 at 8 (citing 1991 WL 672643) (Tr. 762-63)). As for Plaintiff's contention the ALJ should have
 6 limited her to sedentary level work, Defendant points out that even Staley concluded that
 7 Plaintiff was capable of light work. Dkt. 15 at 9 (citing AR 113, 125; *see generally*, 20 C.F.R. §§
 8 404.1567(b), 416.967(b) (defining light work without any reference to crawling or stooping)).

9 The Court has reviewed the DOT for "Sales Attendant" and finds Defendant correctly
 10 states that climbing and crawling is "Not Present - Activity or condition does not exist." *See*,
 11 DOT No. 299.677-010 (Sales Attendant), 1991 WL 672643. Therefore, the Court concurs with
 12 Defendant that any error committed by the ALJ in failing to incorporate into Plaintiff's RFC
 13 Staley's opinion that Plaintiff should "never crawl and climb ladders, ropes, or scaffolds"
 14 resulted in harmless error as it did not impact the ALJ's ultimate finding that Plaintiff remained
 15 capable of performing her past relevant work. *See, Molina v. Astrue*, 674 F.3d 1104, 1115 (9th
 16 Cir. 2012)(citing *Stout v. Commissioner, Social Security Admin.*, 454 F.3d 1050, 1055 (9th Cir.
 17 2006)(an error is harmless if it is not prejudicial to the claimant or it is "inconsequential" to the
 18 ALJ's "ultimate nondisability determination.")).

19 Finally, the Court finds Plaintiff has failed to point to any authority to support her
 20 argument that the ALJ should have limited her to sedentary work instead of light work, and
 21 therefore rejects it.

22
 23
 24

I. CONCLUSION

For the foregoing reasons the Court hereby AFFIRMS Defendant's decision denying benefits.

Dated this 31st day of May, 2023.

David W. Christel
David W. Christel
United States Magistrate Judge